Supreme Court of the United States

OCTOBER TERM, 1924

No. 103 and No. 327

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

and

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

JAY R. BENTON,
Attorney General.

ALEXANDER LINCOLN,
Assistant Attorney General.

Supreme Court of the United States.

October Term, 1924.

No. 103 and No. 327.

ALPHA PORTLAND CEMENT COMPANY,
PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT IN ERROR.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

Now comes the Commonwealth of Massachusetts by Alexander Lincoln, Assistant Attorney General, and moves the court for leave to file in the above-entitled cause the supplemental brief herewith exhibited, for the specific purpose of stating, in response to the inquiry made at the argument, the grounds on which, as the defendant in error contends, the case of Texas Transport and Terminal Co., Inc., *v.* New Orleans, 264 U. S. 150, may be distinguished from the cases at bar.

COMMONWEALTH OF MASSACHUSETTS,
By ALEXANDER LINCOLN,
Assistant Attorney General.

Supreme Court of the United States.

October Term, 1924.

No. 103 and No. 327.

ALPHA PORTLAND CEMENT COMPANY,
PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Inquiry was made at the argument of these cases, respecting the case of Texas Transport and Terminal Co., Inc., *v.* New Orleans, 264 U. S. 150, on what grounds that case may be distinguished from the cases at bar.

Examination of the record in that case (Rec. pp. 10, 11, 32) discloses that the tax of which the plaintiff in error there complained was a license tax imposed by a municipal ordinance, No. 6608 of the Commission Council of New Orleans, which levied a graded license tax upon every business, trade or occupation subject to taxation, including the business of steamship

agents. The tax on that business was graded by the ordinance according to the annual gross receipts of the business, with a maximum of $400 when the year's receipts amounted to $100,000 or more. The ordinance provided that "if the taxpayer does not procure such license, it shall be enjoined from engaging in business in New Orleans"; and it was stipulated that "under the provisions of Ordinance No. 6608, the defendant in rule (plaintiff in error) is required, as a condition to its acting as steamship agent in the City of New Orleans, to procure from the City of New Orleans a license to do so," and again that "the effect of the Ordinance, therefore, is that, if the city of New Orleans can exact such license from the defendant in rule, and if defendant in rule does not pay such license, defendant in rule should be enjoined from acting as steamship agent in the city of New Orleans."

That case is distinguished from the cases at bar, it is submitted, both because the tax is a license tax, payment of which is a condition precedent to the right to do business which may be enforced by injunction, and because the measure of the tax is gross receipts and not net income.

Either of these two grounds, it is submitted, furnishes a sufficient basis for the distinction.

The first basis of distinction is clearly explained in Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 119, where the court said:

> "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph

Co. *v.* Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 695."

In Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696, the court said:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

The second basis of distinction is clearly explained in United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 328, 329, in which the court said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our

decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal constitution because they happen to be engaged in commerce among the States."

Again in Shaffer *v.* Carter, 252 U. S. 37, 57, the court said:

"It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, but only upon the net proceeds, and is plainly sustainable even if it

includes net gains from interstate commerce. U. S. Glue Co *v.* Oak Creek, 247 U. S. 321. Compare Peck & Co. *v.* Lowe 247 U. S. 165."

Respectfully submitted,

JAY R. BENTON,
Attorney General.

ALEXANDER LINCOLN,
Assistant Attorney General.